SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

No. [redacted] 68, October Term, [redacted] 1969

HARRY LAIKIND,

Appellant,

vs.

ATTORNEY GENERAL OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT.

Victor Konow,
A Member of the Bar of the Supreme Court of the United States,
Counsel, at the offices of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

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SUPREME COURT OF THE UNITED STATES

No. --------, October Term, 1968

HARRY LAIKAND,

Appellant,

vs.

ATTORNEY GENERAL OF THE
STATE OF NEW YORK

JURISDICTIONAL STATEMENT

1.(a) The opinions and official reports for this case are:

Court of Appeals,
22 New York Reports, 2d 346.
Exhibit 2B in appendix

Appellate Division of the
Supreme Court,
28 App. Div. 2d 884.

Surrogate's Court,
50 Misc. 2d 1096.

(b)(i) Appellant, a judgment creditor, has been denied satisfaction of his judgment from a fund on deposit for a Russian judgment debtor on the premise that a New York State Statute (SCPA 2218, subsequently amended, June 22, 1968), in substance similar to an unconstitutional Oregon Statute (Ore. Rev. Stat. § 111.070, 1965), without its reciprocity and escheat

provisions; is constitutional. The proceeding was brought by the judgment creditor to compel the Director of Finance of the City of New York pursuant to CPLR 5225 to pay the judgment from the fund on deposit with him.

(b)(ii) The date of judgment and its entry is June 14, 1968. - Exhibit 2A in appendix.

The date of the order denying a rehearing is October 17, 1968. - Exhibit 2C in appendix.

The notice of appeal from the judgment was docketed in the Surrogate's Court on July 15, 1968.

The notice of appeal from

the judgment, after denial of a rehearing, was docketed in the Surrogate's Court on the 15 day of November, 1968.

(b)(iii) The statutory provision believed to confer on this court jurisdiction of the appeal is 28 USC § 1257 (2).

(b)(iv) The cases believed to sustain the jurisdiction are:

Zschernig v. Miller,
389 U. S. 429
Due Process and Equal Protection

Bibb v. Navajo Freight Lines, Inc.,
359 U. S. 520
Reinvocation of Jurisdiction

California Comm'n. v. United States,
355 U. S. 534
Conflict Between a State Statute and a Federal Regulation

(b)(v) SCPA (Surrogate's Court Procedure Act) Art. 22 - 2218 - Exhibit 1 in appendix.

(c) The questions presented by this appeal are:

Is the State statute, as amended, constitutional in whole or in part?

Is the State statute, as amended, constitutional as applied to the judgment creditor in the facts and circumstances of this case in whole or in part?

May the State, by statute, adopt a Federal Regulation and then, by retaining other provisions of the act restrict, limit or avoid its effectiveness?

May a State, by statute, take

inconsistent positions among nations with whom we have similar consular treaties concerning the transmittal of funds to their nationals?

Is the State's interest in statutory restraint of funds due Russian nationals supported by an overriding right of sufficient substance so that the most weighty and substantial purposes of the treaty between the government of the United States of America and the government of the Union of Soviet Socialist Republics, are to be made subordinate to it?

(d) Appellant is a judgment creditor of Dvareh Kaminsky, for whose benefit

funds were deposited in the name of "Davaireh Kaminsky", a Russian resident. The funds, placed in statutory restraint were paid over to the City Director of Finance. Appellant, by order of attachment, attached the funds, served a summons and verified complaint by publication and entered a default judgment on May 18,1964 in the sum of $7,308.00. Execution was issued to the sheriff. The City Director of Finance refused to honor it. The funds still are in his possession pursuant to statutory restraint.

The due process and equal protection clauses were raised in the Appellate Division by brief and at the

argument. The issue was not passed upon by the court.

The due process and equal protection provisions were raised again in the Court of Appeals by brief. The Court of Appeals, in its majority opinion, at page 350, in passing upon the issue, said:

> "Petitioner argues that in view of the recent Supreme Court decision in Zschernig v. Miller (389 U. S. 429, decided Jan. 15, 1968), holding unconstitutional an Oregon statute somewhat similar to New York's statute, there is no basis for defying the release of the funds." - - -
>
> "There are two issues: (1) whether the impounding of the funds here violated the Federal Constitution under the ruling of the Zschernig case; and (2) whether the Surrogate's finding that the default judgment could not support a release of the funds was an abuse of discretion. It

> is concluded that the impounding of the funds was not unconstitutional,- - -".

On the motion for rehearing, the supremacy clause was raised in the supporting brief. The issue was not passed upon by the court.

(e) The federal questions presented in (c) above are substantial because they will bring up matters for this court's consideration such as; the bridging of information gaps with the Soviet Union, making State Statutes similar to the one involved here anachronisms, by discarding their patterns for disposition of funds to Russian nationals and the ill feelings that go with them.

When statutes such as these are taken from our books, a good judgment against a Russian resident will not lose its equal protection in parity of collection.

In substance, the statute, as a creature of hostility, (which the treaty is not), does not lend itself to the subtleties of perfumed constructions nor to sweet talk and light amendments for constitutional sustenance.

Dated: March 12th, 1969

Respectfully submitted,

Victor Konow
A Member of the Bar of the Supreme Court of the United States, Counsel, at the offices of Edward Pious, 261 Broadway, New York, N.Y. 10007.

APPENDIX

EXHIBIT 1

§ 2218. Deposit in court for benefit of legatee, distributee or beneficiary

1. (a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that an alien beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the alien beneficiary will receive the benefit or use or control of the money or property due him shall be upon him or the person claiming from, through or under him.

EXHIBIT 2A
COURT OF APPEALS

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th. day of June in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

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2. No. 152. 68

In the Matter of
the Petition of Harry Laikind,
to render and settle his Account
as Administrator of Sam Leikind,
Deceased,

Appellant-Respondent,

vs.

Attorney General of the State of
New York,

Respondent-Appellant,

Davareh Kaminsky, & ors., & c.,

Defendants.

BE IT REMEMBERED, That on the 22nd. day of March in the year of our Lord one thousand nine hundred and sixty-eight, Harry Laikind, the appellant-respondent in this cause, came here unto the Court of Appeals, by Edward Pious, his attorney-, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Attorney General of the State of New York, the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, pro se, and also filed a Notice of Appeal.

Which said Notices of Appeal and the

return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the matter remitted to the Surrogate's Court for further proceedings in accordance with the opinion herein, with costs to abide the event.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court, Kings County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogate's Court, Kings County, before the Surrogate thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court, before the Surrogate thereof, & c.

SEAL OF
STATE OF NEW YORK
COURT OF APPEALS

s/ RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

EXHIBIT 2B

BREITEL, J. Petitioner appeals, and the Attorney-General cross-appeals, from an order of the Appellate Division, which reversed in a memorandum opinion (one Justice dissenting), a decree of the Surrogate's Court, Kings County, declining to release certain impounded funds. Involved is the effect of former section 269-a of the Surrogate's Court Act (now SCPA 2218), which provided that where the beneficiary of a decedent estate "would not have the benefit or use or control of the money or other property due him," such property is to be paid into court "for the benefit of [such beneficiary] or such person or persons who may thereafter appear to be entitled thereto."

Petitioner applied to the Surrogate's Court for an order directing that a default judgment he had previously obtained in the Supreme Court, Kings County, against Dvaireh (or Davareh as in the title) Kaminsky, a resident of the Soviet Union and a distributee of the decedent estate of one Sam Leikind, be satisfied out of funds deposited with the Director of Finance of the City of New York pursuant to the above statute. The Surrogate denied relief and the Appellate Division reversed, but granted a stay to allow the Attorney-General to seek appropriate relief in the Supreme Court from the default judgment. Petitioner appeals from so much of the Appellate Division order as granted the stay; the Attorney-General appeals from so much of the order as reversed the Surrogate's decree.

Dvaireh Kaminsky's share of the estate of Sam Leikind had been deposited with the Director of Finance pursuant to a decree of the Surrogate's Court dated October 19, 1961. Subsequent to this decree, petitioner, a brother of decedent and Dvaireh, who was also the administrator of the estate, brought an action against Dvaireh in the Supreme Court for money owed. His claim was apparently based on a letter he had received from his sister which acknowledged her prior promise to repay money he had previously sent her and suggested that he try to obtain the money out of her inheritance. Jurisdiction over Dvaireh in the action was obtained by attachment of the funds on deposit and service was effected through publication. No answer or appearance was interposed. Judgment on default was entered on May 18, 1964 in the sum of $7,308.

Petitioner sought to satisfy the judgment out of the impounded funds but the Director of Finance refused to honor the Sheriff's levy. Petitioner then moved in the Supreme Court for an order requiring the Director of Finance to release the funds. The motion was denied, with leave to petitioner to apply to the Surrogate for such an order. In denying the application to him the Surrogate held that the effort to procure the funds was intentionally evasive of the statute, and that, in any event, since Dvaireh had no power to obtain the funds, she also lacked power to accomplish their reach by another. The Appellate Division held that the impounded funds were subject to attachment and that the Attorney-General, in effect, was mounting a collateral attack on the Supreme Court judgment.

Petitioner argues that in view of the recent Supreme Court decision in *Zschernig* v. *Miller* (389 U. S. 429, decided Jan. 15, 1968), holding unconstitutional an Oregon statute somewhat similar to New York's statute, there is no basis for denying the release of the funds. The Attorney-General, on the other hand, contends that (1) the default judgment constituted an evident attempt to evade the statute and was, therefore, a nullity; (2) *Zschernig* v. *Miller* is inapplicable to the New York statute; and (3) in any event, the constitutionality of the New York statute is not properly raised for the first time in this court.[1]

There are two issues: (1) whether the impounding of the funds here violated the Federal Constitution under the ruling of the *Zschernig* case; and (2) whether the Surrogate's finding that the default judgment could not support a release of the funds was an abuse of discretion. It is concluded that the impounding of the funds was not unconstitutional, but the matter should be remanded to the Surrogate for a hearing and further findings as to the effect to be given the default judgment.

In *Zschernig* v. *Miller* (*supra*) the Supreme Court considered the constitutionality of an Oregon statute similar in some respects to the New York statute. Oregon's statute provided for escheat of property claimed by a nonresident alien distributee of an estate unless (1) American citizens had a right to take property in the foreign country on the same terms as

1. But see Cohen and Karger, Powers of the New York Court of Appeals, §§ 168, 169.

residents of the foreign country; (2) American citizens had a reciprocal right to receive funds from estates in the foreign country; and (3) the foreign distributee would have the "benefit, use or control" of property from the estate of the American deceased. The Supreme Court found that in applying each of the requirements the Oregon courts had improperly intruded into the field of foreign affairs reserved to the Federal executive and legislature.

The majority opinion deliberately refrained from re-examining its decision in *Clark* v. *Allen* (331 U. S. 503), which had held that a California statute, containing a reciprocity requirement similar to that in Oregon, was not unconstitutional on its face. Of *Clark* v. *Allen* (*supra*) it said, "The case seemed to involve no more than a routine reading of foreign laws" (389 U. S., *supra*, p. 433). It observed, however, that under the Oregon statute the courts had in fact "launched inquiries into the type of governments that obtain in a particular foreign nation" and had conducted "minute inquiries concerning the actual administration of foreign law" (*id.*, pp. 434, 435). It concluded, therefore, that the application of the Oregon statute resulted in an unconstitutional involvement by the State in foreign affairs. There was no explicit condemnation of the statute on its face.

Despite some similarities, the Oregon and New York statutes are different. The New York statute, unlike the one in Oregon, contains no provision for reciprocity or escheat. The acceptance of a reciprocity provision in *Clark* v. *Allen* (*supra*), evidently reaffirmed in the *Zschernig* case, is, therefore, of little help in resolving the issues in this case. On the other hand, the absence of an escheat provision in the New York statute, even though the Oregon escheat provision was not discussed or made a ground of decision by the Supreme Court, may be of critical importance in sustaining the validity of New York's statute, at least on its face.

Moreover, the majority opinion in the *Zschernig* case, in accepting the constitutionality of "reciprocity," "arguably accepted "benefit, use or control" provisions as valid, provided State courts did no more than "routinely read" foreign laws and provided there was no palpable interference with foreign

relations in their application.[2] Thus, if the courts of this State, in applying the "benefit or use or control" requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise, prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case. Indeed, petitioner has made no showing that the lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations. Consequently, there is no present warrant to reconsider the earlier rulings of this court sustaining the constitutionality of the statutes which preceded the present one (*Matter of Marek*, 11 N Y 2d 740, app. dsmd. *sub nom. Ioannou v. New York*, 371 U. S. 30 [for want of a substantial Federal question];[3] *Matter of Braier*, 305 N. Y. 148, 156, app. dsmd. *sub nom. Kalmane v. Green*, 346 U. S. 802).

Thus, the impounding of Dvairch's share in the estate was not proscribed under the principles thus far made explicit in the *Zschernig* and *Clark* cases. Nevertheless, the applicable New York statute does not necessarily require that the funds be restricted until it is determined that the beneficiary himself

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2. Although the sweep of the opinion might suggest to some that in a later case the court might hold that in reality no such statute could ever be restricted to a "routine reading". (Also, see concurring opn. by STEWART and BRENNAN, JJ., finding the Oregon statute unconstitutional on its face [389 U. S. 429, 442].)

3. The Supreme Court recently entertained an application by the petitioner in *Ioannou v. New York* (*supra*) for rehearing and asked the State Attorney-General to file an answer (36 U. S. Law Week 3390). The petition has since been denied on representations by the State Attorney-General as to further procedure available in the State (36 U. S. Law Week 3463; *New York Times*, June 4, 1968, p. 74, col. 4). It must be noted that certain of the examples cited by the Supreme Court in the *Zschernig* case as prohibited conduct purportedly occurred in New York courts (389 U. S., p. 437, n. 8). Further, the Supreme Court in *Goldstein v. Cox* (389 U. S. 581) ordered that in light of *Zschernig v. Miller* (*supra*) petitioner's application for the convening of a three Judge Federal District Court to determine the constitutionality of the New York statute be granted. (See, also, *Matter of Lehotzky*, N. Y. L. J., Jan. 29, 1968, p. 18, col. 7, in which the Surrogate of Bronx County held the New York statute unconstitutional under the *Zschernig* case. But see, also, *Matter of Harmoza*, 57 Misc 2d 40.)

will have "benefit or use or control" of them. The funds are also impounded "for the benefit of * * * such person or persons who may thereafter appear to be entitled thereto." Hence, it must be determined whether petitioner, by virtue of his status as judgment creditor of Dvaireh, is a person entitled to the funds.

Funds which are *in custodia legis*, and in which the owner has a present interest, may be attached or garnished for purposes of obtaining jurisdiction (*Dunlop v. Patterson Fire Ins. Co.*, 74 N. Y. 145, 148 [funds deposited in court by defendant as an undertaking on appeal could be attached by a claimant of defendant]; cf. *Commission for Polish Relief v. Banca Nationala a Rumanici*, 288 N. Y. 332, 338, affg. 262 App. Div. 543, 546 [citing the *Dunlop* case and holding that funds of defendant Rumanian bank deposited in New York banks, which could not be transferred or withdrawn under the terms of an Executive Order, could be attached by a resident claimant of the Rumanian bank]; see Ann.—Funds in Court—Garnishment, 1 ALR 3d 936, 944, 945; but see 7 C. J. S. Attachment, § 88, p. 260). In the *Dunlop* and *Polish Relief* cases it was held that the owner of the funds, although not now entitled to receive them, had a sufficient right and interest in the property to enable a claimant to obtain jurisdiction quasi in rem through attachment. Thus, in this matter the Supreme Court had acquired such jurisdiction, and, upon the defendant's default, had the power to enter judgment in favor of petitioner.

Further, although the judgment did not automatically entitle petitioner to satisfaction out of the impounded funds, such satisfaction could be obtained when the purposes of the restraint had been achieved or upon a determination that such satisfaction would no longer interfere with the purposes of the restraint (*First Nat. Bank of Oswego v. Dean*, 97 N. Y. 149, 158-159; *Wehle v. Conner*, 83 N. Y. 231, 236-237; *Hayden v. Dean*, 91 App. Div. 109, 113-114; cf. *Commission for Polish Relief v. Banca Nationala a Rumanici*, 288 N. Y. 332, 338, *supra*).

It is concluded, therefore, that, on the present record and with the present parties, petitioner's judgment is both legally effective and valid, albeit not without restriction as to enforcement out of the impounded funds. The Surrogate might yet order satisfaction from the impounded funds if he first deter-

mined that such satisfaction would not conflict with the provisions or the purposes of the statute.

The statute's primary purpose is to prevent the transmission of funds to a beneficiary in a foreign country where such transmission "might be circumvented by confiscation in whole or in part" (*Matter of Braier*, 305 N. Y. 148, 154, *supra*; L. 1939, ch. 343, bill note, p. 795). This court has held that an assignment by the nonresident owners of the impounded funds is inconsistent with the statutory purpose (*Matter of Geiger*, 7 N Y 2d 109, 112). The court reasoned that the owners had already been determined not to have control over the funds for the time being, and thus were in no position to direct their disposition. However, and this is significant in the context of this case, the court excepted from its holding the possibility of proceedings by the assignee based on a valid claim for compensation for legal services rendered to the nonresident owners in connection with the estate (*supra*; p. 112). Thus, there is no rule completely immunizing the impounded funds from all obligations derived from the distributee. Only those obligations are excluded which rest solely on the voluntary transfer by, or commitment of, the distributee in contradiction of his disability to control the fund.

On the other hand, the fact that the judgment creditor is a New York resident and, therefore, arguably there is no risk that the funds will leave the country, is not conclusive. It is conceivable that a court might find the submission to the default judgment did not result from a "voluntary" acceptance by the distributee of her obligation to her brother or would not result in actual payment to and retention by the brother. The present record contains no evidence of any such situation, but neither does it establish that the default judgment was the result of benefits conferred on the distributee or was even a bona fide gift to her brother.

In short, on the present record, a final disposition would be premature. The Surrogate doubted the *bona fides* of the default judgment, and also held that if Dvairch could not receive the funds herself she could not permit them to be obtained by a creditor. The doubt was based on the papers alone. It is, therefore, necessary that the matter be remanded to enable the Surrogate to hold a hearing and make further findings concerning whether the underlying debt was a genuine one, in the sense

that it was derived from an actual benefit to the distributee on a promise to pay, or was even a bona fide gift, and whether payment therefor to the judgment creditor would be solely for his use or benefit and would not be used directly or indirectly to defeat the purposes of the statute.

This is not to say that the Surrogate could "invalidate" the Supreme Court judgment should he determine that its enforcement out of the funds would not achieve the purposes of the statute. Even assuming he found that the judgment was obtained in an attempt to avoid the statute, and thus could not be enforced against the impounded funds at this time, the judgment would still have legal validity so long as it was not vacated in a direct attack. It could be enforced, for example, against the impounded funds should changed circumstances render such enforcement consonant with the statutory purpose. In addition, if Dvaireh had chosen to appear in the Supreme Court action, resulting in a default judgment in personam rather than quasi in rem, a similar determination by the Surrogate that the impounded funds could not now be used for satisfaction of the judgment would not prevent its satisfaction out of other property belonging to Dvaireh which petitioner might be able to locate. Thus the Surrogate is not being called upon to determine the validity of the judgment, but rather whether satisfaction out of the funds in his care at this time conforms to the purposes of the statute.

Accordingly, the order of the Appellate Division should be reversed and the matter remanded to the Surrogate for a hearing and further findings, with costs to abide the event.

Chief Judge Fuld (dissenting). The determination now being made—which authorizes the Surrogate to withhold release of the decedent's funds (Surrogate's Ct. Act, § 269-a, now SCPA 2218)—seems to me to be violative of the policies enunciated by the Supreme Court in its recent decision in *Zschernig* v. *Miller* (389 U. S. 429, particularly p. 437, n. 8; see, also, *Ioannou* v. *New York*, —— U. S. ——, 36 U. S. Law Week 3463 [decided June 3, 1968]). The majority's conclusion that an assignment by a nonresident owner of impounded funds may be inconsistent with the statutory purpose rests upon the assumption that, "because of the special circumstances in which the beneficiaries

find themselves as domiciliaries in an iron-curtain country, they are in no position presently to assign any part of the funds withheld." (*Matter of Geiger*, 7 N Y 2d 109, 112.) Such an assumption has, to quote from the opinion in *Zschernig* (389 U.S., at p. 441), "a direct impact upon foreign relations" and is beyond the competence of the Surrogate's Court. Accordingly, I would affirm.

Judges BURKE, SCILEPPI, BERGAN and JASEN concur with Judge BREITEL; Chief Judge FULD dissents and votes to affirm in a separate opinion; Judge KEATING dissents and votes to affirm on the opinion at the Appellate Division.

Order reversed and matter remitted to the Surrogate's Court for further proceedings in accordance with the opinion herein, with costs to abide the event.

EXHIBIT 2C

STATE OF NEW YORK,

In Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventeenth day of October A. D. 1968.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 1088

In the Matter of the Petition of Harry Laikind to render and settle his account as Administrator of Sam Leikind, deceased,

Appellant-Respondent,

vs.

Attorney General of the State of New York, pro se,

Respondent-Appellant,

& ors., & c.,

Defendants.

A motion for a reargument of the above cause having heretofore been made upon the part of the appellant-respondent

in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

SEAL OF
STATE OF NEW YORK
COURT OF APPEALS

s/ Gearon Kimball
Deputy Clerk

[redacted]

SUPREME COURT, U. S.
FILED
APR 14 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 65

HARRY LAIKIND,

Appellant,

against

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1160

HARRY LAIKIND,

Appellant,

against

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court's revised Rules, appellee moves: to dismiss the appeal taken from the order of the Court of Appeals of the State of New York which reversed an order of the Appellate Division of the Supreme Court of the State of New York and remanded the matter for further hearings in the Surrogate's Court of Kings County in conformity with the opinion of the Court of Appeals; or in the alternative, to affirm said order. We so move on the ground that, at this stage of this proceeding, the question sought to be presented is so insubstantial as not to merit or require further argument.

Question Presented

The terms of the New York statute (Surrogate's Court Procedure Act, § 2218, formerly Surrogate's Court Act, § 269-a), attacked as unconstitutional, are valid and have

survived several prior attacks in this court. *Matter of Braier*, 305 N. Y. 148, 691 (1953), app. dism., *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953); *Matter of Marek*, 11 N. Y. 2d 740 (1962), app. dism. *sub nom. Ioannou* v. *New York*, 371 U. S. 30 (1962); rehearing denied, 391 U. S. 604 (1968).

The only question presented by this record is whether the Court of Appeals on the meager record before it in this proceeding correctly rejected appellant's contention that the Surrogate's Court could not constitutionally apply the provisions of the statute.

Statement

(1)

Pursuant to a decree of the Surrogate's Court, Kings County, dated October 19, 1961, the sum of $7,397.03 was deposited with the Treasurer of the City of New York to the credit of a distributee, Dvaireh Kaminsky, a subject of the Soviet Union, residing in Minsk, Russia in accordance with the Surrogate's Court Act, § 269-a (now § 2218 of the Surrogate's Court Procedure Act).

Appellant had been the administrator of the estate from which the deposit was directed. He is also a brother of the distributee whose distributive share was the only share so ordered to be deposited.

(2)

On March 18, 1964, appellant, in his personal capacity, recovered a default judgment against his sister in the sum of $7,308 in an action instituted in the Supreme Court, Kings County.

Although the judgment was entered upon a statement that the summons and complaint had been personally served, an asterisk at the foot of the judgment corrected

the statement for the 1964 judgment to recite the following:

> "Amended August 1, 1966 as of May 18, 1966 so as to recite that the summons in this action was served by publication * * *."

Prior to the recovery of the judgment, petitioner had allegedly received a letter in which the distributee, his sister, acknowledged in October, 1963 that she owed the petitioner $3,600 and that she had promised to "repay this money to you with interest".

As of March 17, 1965, the Director of Finance of the City of New York (formerly City Treasurer) certified that he held to the credit of Dvaireh Kaminsky, a resident of Russia, the sum of $7,283.32, subject to the order of the Court.

The funds on deposit with the Director of Finance had been attached by the Sheriff of New York County pursuant to an order made January 7, 1964 by the Supreme Court, Kings County, prior to the date of the judgment. The Director of Finance refused to honor the Sheriff's levy unless an order were made by the Surrogate's Court by which the funds had been deposited authorizing and directing him to turn them over.

(3)

Appellant made a motion for the release of the funds in the Supreme Court, Kings County, which motion was denied with leave to him to make application to the Surrogate of Kings County for the same relief.

(4)

Thereupon, appellant petitioned the Surrogate's Court of Kings County for an order directing the Director of Finance of the City of New York to pay over to the Sheriff of the County of New York the sum of $7,308 plus interest

accrued upon his judgment to satisfy said judgment out of the funds held to the credit of Dvaireh Kaminsky.

An order to show cause was issued on the petition on the 18th day of April, 1966 directed to, among others, the Attorney General of the State of New York to show cause why such sum should not be paid.

The Surrogate, without a trial, denied the application, in effect, finding that the judgment obtained by appellant in the Supreme Court was a scheme evolved to circumvent Surrogate's Court Act § 269-a. (50 Misc. 2d 1096.) The Court never reached any other question.

(5)

Appellant appealed this decision to the Appellate Division of the Supreme Court of the State of New York which, by order entered July 10, 1967, reversed the decree of the Surrogate, but, in accordance with its opinion (28 App. Div. 2d 884), afforded the Attorney General of the State of New York the opportunity to enter an appearance in the Supreme Court of the State of New York for the purpose of making a direct attack on the judgment obtained therein.

(6)

Appellant then appealed to the New York Court of Appeals and challenged for the first time the constitutionality of the statute under the then recent decisions of this Court in *Zschernig* v. *Miller*, 389 U. S. 429 (Jan. 1968) and *Goldstein* v. *Cox*, 389 U. S. 581 (Jan. 1968). The Attorney General of the State of New York cross-appealed.

The Court of Appeals of the State of New York reviewed the history of the statute and decisions and, analyzing the effect of the *Zschernig* decision, determined that the statute was not unconstitutional on its face, but might be unconstitutionally applied. Guidelines were set forth for the constitutional application of the State statute and, in view

of the fact that no hearing had been held in the Surrogate's Court on the basis of which a determination could be made as to whether or not the statute had been misapplied, the matter was remanded to the Surrogate's Court for further hearings in conformity with its opinion. (22 N. Y. 2d 346.)

(7)

Instead of obeying the mandate of the Court of Appeals, an appeal was taken to this Court pursuant to the provisions of Title 28 U.S.C. § 1257(2). Furthermore, while such appeal was pending, a motion for reargument was made by appellant in the Court of Appeals on the ground of supervening events. Reargument was denied without opinion. (22 N. Y. 2d 973.).

ARGUMENT

This appeal should be dismissed since it presents no substantial federal question and is premature.

Title 28 U.S.C. § 1257(2) provides for the review of final judgments or decrees rendered by the highest court of the State. The remand of this case to the Surrogate's Court of the County of Kings, due to the meager record below, can hardly be interpreted as a final determination on the merits by the highest court of the State of New York. In *Gorun* v. *Fall*, 287 F. Supp. 725 (1968), the United States District Court for the District of Montana, Helena Division, recognized that:

> "It seems clear from *Zschernig* that reciprocity statutes are not unconstitutional per se and that if a state reciprocity statute requires that the state courts do no more than read the law of a foreign nation to determine whether reciprocity exists; then the law does not infringe upon the prerogatives of the federal government. If, on the other hand, state courts find it necessary to engage in the kind of analysis exemplified

> by *State Land Board* v. *Pekarek*, 234 Or. 74, 378 P. 2d 734, and *in re Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, to apply a state statute, then the law as applied is unconstitutional." (p. 728)

This determination was affirmed by this Court in a *Per Curiam* opinion. *Gorun* v. *Fall*, —— U. S. ——, 21 L. Ed. 2d 628, 37 U. S. Law Week 3261 (decided January 20, 1969).

Although the New York statute does not involve reciprocity, the statements of the District Court in *Gorun* denying the motion for summary judgment, which was affirmed by this Court, are quite apposite to the within proceedings.

The Court of Appeals of the State of New York recognized the distinction between a statute which is unconstitutional on its face and one which could be applied in such a manner as not to improperly intrude upon the rights reserved to the federal government. The Court of Appeals saw, as did the Court in *Gorun*, that the statute could be applied in a manner consonant with the Constitution of the United States. Judge Breitel (*Matter of Leikind*, 22 N. Y. 2d 346, 351, 352) stated in the majority opinion:

> "Moreover, the majority opinion in the *Zschernig* case, in accepting the constitutionality of 'reciprocity,' arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in the application. Thus, if the courts of this State, in applying the 'benefit or use or control' requirements, simply determine, without animadversions, whether or not a foreign country, by statute or otherwise prevents its residents from actually sharing in the estates of New York decedents, the statute would not be unconstitutional under the explicit rationale of the *Zschernig* case. Indeed, petitioner has made no showing that the

lower courts in this case have currently engaged in the conduct criticized, and additionally illustrated in the footnotes of the *Zschernig* case, as interference with foreign relations. Consequently, there is no present warrant to reconsider the earlier rulings of this court sustaining the constitutionality of the statutes which preceded the present one (*Matter of Marek*, 11 N. Y 2d 740, app. dsmd. *sub nom. Ioannou* v. *New York*, 371 U. S. 30 [for want of a substantial Federal question]; *Matter of Braier*, 305 N. Y. 148, 156, app. dsmd. *sub nom. Kalmane* v. *Green*, 346 U. S. 802."

There is no reason to suppose that in the light of this decision, the intervention of a federal court will be either necessary or appropriate to secure any constitutional rights of appellant.

The door to the Surrogate's Court, County of Kings, is open to the presentation of any claims for the payment of any estate shares to which the claimant may be entitled, *Ioannou* v. *New York*, 391 U. S. 604 (1968). As a matter of fact, since the decision in *Leikind*, distributive shares, previously deposited for the benefit of alien distributees, have been allowed to be withdrawn from the depository in many cases, on a proper showing that the law of the foreign jurisdiction wherein these aliens resided permitted them to inherit and enjoy the benefits of these sums.

We need not now speculate as to whether, if appellant had returned to the Surrogate's Court of Kings County and furnished proof of this fact, among others, to the Surrogate, he would not have obtained the release of the funds sought herein. Indeed, see appellant's amendment to his jurisdictional statement.

Nor is there any merit to appellant's contention that an amendment to the New York statute, effective June 22, 1968, adopting federal regulations as a bar to the transmittal of funds, is effective against him since the amend-

ment to 31 C.F.R. § 211.2, on June 28, 1968, removed the Soviet Union from the list of restricted areas to which funds of the United States may not be transmitted and, consequently, the amendment would have no application.

CONCLUSION

The order of the Court of Appeals of the State of New York should be affirmed, or this appeal should be dismissed.

Dated: New York, New York, April 11, 1969.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Appellant *Pro Se*

Samuel A. Hirshowitz
First Assistant Attorney General

Warren M. Goidel
Assistant Attorney General,
of Counsel.

SUPREME COURT OF THE UNITED STATES

No [redacted] October Term, [redacted] 1964

65

HARRY LAIKIND,

Appellant,

vs.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

MOTION FOR LEAVE TO SUPPLEMENT
JURISDICTIONAL STATEMENT
AND
SUPPLEMENT

Victor Konow,
A Member of the Bar of
the Supreme Court of
the United States,
Counsel, at the offices
of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

ity opinion (p. 352, ft. nte. 3) has recognized the lack of uniformity among some of the surrogates in the application of the statute. Neither the statute's amendment[1]; nor the amendment to the Code of Federal Regulations (Treasury Regulation here)[2a]; nor even Article II of the treaty[2b] have had any effect upon

1 Subdiv. 1(a) and (b) of exh. I in jurisdictional statement.

2a Exh. A, infra.

2b Compilation of Presidential Documents, 1968, vol. 4, no. 24, p. 956. The treaty as a whole, does not represent an easy abandonment of our traditional concepts, but rather, a most cautious, conservative, 35 year approach to a bridging of irreconcilible international orders. Because of its 3 appended "extraordinary" protocols, the treaty calls for careful preservation, on the highest plane, of those conditions which avert and remove irritations, resolve conflicts and ameliorate friction in sensitive areas. Exh. B, infra.

the Court of Appeals, who denied the motion for a rehearing premised upon the change in our relations with the U.S.S.R. nor upon divergency among the surrogates.

The presence of the Attorney General in this Kings County matter, in which the judgment debtor is a resident of Minsk[3] too, is in keeping with these differing views.

The exercise of free will and independent action by the U.S.S.R. national with respect to the funds in restraint here, without government interference, coercion, collusion, direction, control or criticism - to this day - openly contradicts state court pronouncements to

3 R. p. 21, exh. E.

TO: THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF
THE SUPREME COURT OF THE
UNITED STATES.

Appellant respectfully moves this Court for permission to supplement his jurisdictional statement with facts and details of a new case, infra, undecided when this appeal was docketed on March 15, 1969.

Dated: March 31, 1969.

Victor Konow,
A Member of the Bar of
the Supreme Court of
the United States,
Counsel, at the offices
of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

TO: ATTORNEY GENERAL OF THE
STATE OF NEW YORK

On the 24th day of March, 1969, the New York Law Journal, published on page 16, a decision made by a New York County Surrogate on March 19, 1969, in the Estate of Jacob Adelson, index no. 5784 - 1965, saying:

> "The distributive share of Abraham Adelson will be paid by transmittal of the sum due through the facilities and services of Vnestorg Bank and/or Vneshpostyltorg, Moscow, U.S.S.R."

Albert N. Androssov, Deputy Chief of the Consular Division of the U.S.S.R., in the District of Columbia, on February 27, 1969, signed a notice of appearance, on record in this matter, stating he "is acting on behalf of Abraham Adelson", a resident of Minsk, U.S.S.R., who is a distributee of his deceased

brother, Jacob.

Another brother of the deceased, a resident of the United States, petitioned the surrogate to order:

> "(T)he balance of said distributive share of ABRAHAM ADELSON be held by petitioner or another relative for the benefit of ABRAHAM ADELSON and that food packages be purchased and sent to ABRAHAM ADELSON and/or his wife in the U.S.S.R."

No objections were entered by the Deputy Consul to the petitioner's request.

The note of the law assistant to the surrogate says:

> "Instructions requested re payment for food packages sent and to be sent to a distributee residing in Russia - - -."

The Court of Appeals, in its ma-

the contrary. They have changed, but we, in our state, as yet, have not seen their light.

Dated: March 31, 1969

Respectfully submitted,

Victor Konow,
A Member of the Bar of
the Supreme Court of
the United States,
Counsel, at the offices
of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

APPENDIX.

Exhibit A

"On the basis of information available to the Secretary of the Treasury, including advice received from the Department of State, the Secretary has determined that postal, transportation and banking facilities in general, and local conditions in - - - the Union of Soviet Socialist Republics are such that there is a reasonable assurance that the payee of a check or warrant drawn against funds of the United States, or any agency or instrumentality thereof, will actually receive such a check or warrant and be able to negotiate it for full value. - - -.

"Accordingly, § 211.2(a), Subchapter A, Chapter II of Title 31 of the Code of Federal Regulations is amended to read as follows:

"It is hereby determined that postal, transportation, or banking facilities in general or local conditions in Albania, Communist-controlled China, Cuba, North Korea, North Viet-Nam, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value." (In effect June 28, 1968)

Exhibit B

ARTICLE 10

1. In the case of the death of a national of the sending state in the territory of the receiving state, without leaving in the territory of his decease any known heir or testamentary executor, the appropriate local authorities of the receiving state shall as promptly as possible inform a consular officer of the sending state.

2. A consular officer of the sending state may, within the discretion of the appropriate judicial authorities and if permissible under then existing applicable local law in the receiving state:

(a) take provisional custody of the personal property left by a deceased national of the sending state, provided that the decedent shall have left in the receiving state no heir or testamentary executor appointed by the decedent to take care of his personal estate; provided that such provisional custody shall be relinquished to a duly appointed administrator;

(b) administer the estate of a deceased national of the sending state who is not a resident of the receiving state at the time of his death, who leaves no testamentary executor, and who leaves in the receiving state no heir, provided that if authorized to administer the estate, the consular officer shall relinquish such administration upon the appointment of another administrator;

(c) represent the interests of a national of the sending state in an estate in the receiving state, provided that such national is not a resident of the receiving state, unless or until such national is otherwise represented: provided, however, that nothing herein shall authorize a consular officer to act as an attorney at law.

3. Unless prohibited by law, a consular officer may, within the discretion of the court, agency, or person making distribution, receive for transmission to a national of the sending state who is not a resident of the receiving state any money or property to which such national is entitled as a consequence of the death of another person, including shares in an estate, payments made pursuant to workmen's compensation laws, pension and social benefits systems in general, and proceeds of insurance policies.

The court, agency, or person making distribution may require that a consular officer comply with conditions laid down with regard to: (a) presenting a power of attorney or other authorization from such nonresident national, (b) furnishing reasonable evidence of the receipt of such money or property by such national, and (c) returning the money or property in the event he is unable to furnish such evidence.

4. Whenever a consular officer shall perform the functions referred to in paragraphs 2 and 3 of this Article, he shall be subject, with respect to the exercise of such functions, to the laws of the receiving state and to the civil jurisdiction of the judicial and administrative authorities of the receiving state in the same manner and to the same extent as a national of the receiving state.

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SUPREME COURT OF THE UNITED STATES

No. [redacted]68 October Term, [redacted]1969

HARRY LAIKIND,

Appellant,

vs.

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

BRIEF IN OPPOSITION TO DISMISS OR AFFIRM.

Victor Konow,
A Member of the Bar of the Supreme Court of the United States,
Counsel, at the offices of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

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POINT I

A HEARING ON REMAND BEFORE THE SURROGATE, AS SUGGESTED BY THE ATTORNEY GENERAL, MEANS ACCEPTANCE OF CONSTITUTIONAL VALIDITY.

The Court of Appeals remanded this matter to the surrogate upon a finding of constitutional validity. Had the ruling been otherwise, a remand would have been unnecessary. A letter of election to proceed here only was sent to this Court and the Attorney General on August 6, 1968. (Exh. A-OPP. in appendix).

The motion for rehearing was premised upon conditions arising subsequent to the judgment of the Court of Appeals and upon a different provision of the Constitution. It is as though there are two appeals before this Court in one matter.

POINT II

THE AMENDMENT TO SCPA 2218, DIVESTED AND RELEASED FROM ITS SUBDIVS. 2 AND 3, IS VALID, CONSTITUTIONALLY.

The treaty, (TIAS 6503), as an instrument of international policy, is the product of a change in concepts between two dynamic systems of government. Keyed to it are amendments to the Code of Federal Regulations, in effect June 28, 1968, (Appendix, Exh. A, Supplement to Jurisdictional Statement), and to SCPA 2218, in effect June 22, 1968, (Appendix, Exh. 1, Jurisdictional Statement).

It is a new door framed by a new amendment to the Treasury Regulation, hinged with a new amendment to SCPA 2218 whose old bolts (subdivs. 2 and 3), still are in place.

The amendment to the statute, when it speaks for itself, makes sense. It then becomes a sounding board for the Treasury Regulation and the treaty in consonance with present day international motivations, considerations and directions. Attached to the old, it loses its resonance by continuing a confusing statutory pattern of encouragement towards animadversions at state levels of expedience, rather than national planes of long term experience, on those occasions when Russia acts in a manner contrary to the popular feelings of the moment.

The words, "Unless prohibited by law", as used in Art. 10, subdiv. 3, (Appendix, Exh. B, Supplement to Jurisdictional Statement), may refer only to United States Laws or Regulations

specifically enacted or promulgated to fluctuate with the ebb and flow of international relations.

A legal prohibition affecting international agreements, for international recognition and acceptance, may be enacted or promulgated by the contracting parties only. This is significant in our relations with Russia. Though all members of the United Nations are ipso facto parties to the Statute of the International Court of Justice annexed to the Charter of the United Nations (art. 93, UN Charter), Russia, is not one of those countries who have accepted the compulsory jurisdiction of the International Court of Justice pursuant to art. 36 of the Statute of the Court (59 Stat. 1055; TS 993).

A practical example is our treaty of friendship, commerce, and navigation with China, (63 Stat. 1299; TIAS 1871), which our Department of State presently considers to be suspended with respect to areas of China not controlled by the National Government of the Republic of China. In these circumstances, "Red" China, is on the proscribed list of the Treasury Regulation.

Should states, separately, be allowed to enact statutory prohibitions, the diversity of enactments would be such, that national hegemony would be lost to them in international affairs. A state may "ride" with the treaty but not "fight" it.

The same Art. 10 empowers the

states, in making distribution, with a discretionary right to require, (a) a power of attorney or other authorization, (b) proof of the receipt of the money or property by the alien national, and (c) where such proof is lacking, return of the money or property. This then, is the limit of state power in the treaty over a Russian national's funds.

Literal impediments to treaty fulfillment, according to Associate Judge Burke of our State Court of Appeals in Eck v. Arab Airlines, Inc., 15 New York 2d 53, 60, are "at odds with the tenor of the document.", depriving "it of the force it was intended to have.", as a whole. So also, statutory prohibitions enacted by the states would have the same effect as an Act of State by applying themselves

to the acts of other governments.

The treaty's "extraordinary" protocols, which provide, 1. a right of notification to the U. S. Consul of a national's arrest or detention within one to three days after the occurrence of the event, 2. a right to visit and communicate with a national arrested or otherwise detained in custody within two to four days after such action is taken; and 3. a continuing right of visitation and communication with such national whether arrested, otherwise detained or serving a prison sentence; are not unrelated to Art. 10.

On July 30, 1965, the Senate Committee on (F. R.), at a "closed" hearing, heard the protocols evaluated in these words:

Chairman

P. 1

"It is the committee's understanding - - - that this treaty contains certain extraordinary provisions for the protection of American citizens - - -."

Secretary of State

P. 18

"Because we value so highly the protection of individual rights, the Convention's provisions on notification and access have particular significance.

The U.S.S.R. - - - never before (has) given so specific a guarantee on access."

Chairman

P. 32

"- - -(Y)ou have been concerned about - - - the increasing number of Americans going to the Soviet Union?"

Secretary of State

"That is correct - - - our responsibilities for offering them protection have been growing rapidly."

The measure of principal released to Russian nationals is weighed by our government in the principle of protection received by our nationals in Soviet territories, not by any actual monetary reciprocity.

Russia's 2,287,000 residents in the U. S.; 689,000 of whom were born abroad and the balance locally, either of alien or mixed parentage, are the resevoir for the vast accumulation of funds now in restraint. There is no balanced counterpart in the U.S.S.R. (Statistical Abstract of the United States, 89th Edition, June 1968, U.S. Department of Commerce, No. 33, p. 31, Source, Department of Commerce, Bureau of the Census, Vol. 1, 1960.)

The treaty should work with consistent regularity if permitted to func-

tion in the same manner as Japan's Convention Art. 18, which is almost identical with Art. 10 here. (15 UST 768; TIAS 5602; 518 UNTS 179). Funds due Japanese nationals are not subject to statutory restraint. Why then, in almost identical situations, are Russian nationals required to submit to the double standard of making continuous applications for permission to apply for licenses? A showing by one Russian of benefit, use and control should be sufficient for all; and, even that, is not a necessary requisite in the light of the treaty.

In substance, an additive (such as the amendment is set out to be by the Attorney General) which adheres to archaic, inner implanted, deeply rooted rancors (such as are implicit in the

motivations for the statute's first enactment) will serve, not master, its parent, and; unless there is a cutting away from the old, will become imbued with many, if not most, of its parental shortcomings.

Dated: April 21, 1969.

Respectfully submitted,

Victor Konow,
A Member of the Bar of
the Supreme Court of
the United States,
Counsel, at the offices
of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

EXHIBIT A - OPP.

EDWARD PIOUS
Counselor at Law
-
Phone COrtlandt 7-4665
4664

261 Broadway
New York, N.Y.
10007

August 6, 1968

Supreme Court of the United States
Washington, District of Columbia

Re: Laikind

Gentlemen:

For informational purposes enclosed is Notice of Appeal, Request to Certify and unrevised copies of the Opinions of the Court of Appeals of the State of New York.

An election being involved between proceeding in this Court upon the theory of statutory unconstitutionality as applied here or before the Surrogate as suggested in the Majority Opinion of the Court of Appeals of

the State of New York pursuant to that Court's decision "(T)hat the impoundding of the funds was not unconstitutional", appellant elects to proceed with his appeal in this Court and not before the Surrogate.

Yours very truly,

s/ Edward Pious

EDWARD PIOUS

EP:rw
Encs. 2

CC: Court of Appeals of the
State of New York

Surrogate's Court of the
State of New York - Kings County

Attorney General of the State
of New York

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Supreme Court of the United States

No. [redacted] 68 October Term, [redacted] 1969

HARRY LAIKIND,

Appellant.

—vs.—

ATTORNEY GENERAL OF THE STATE OF NEW YORK.

Appellee.

SUPPLEMENTAL BRIEF

VICTOR KONOW,
A member of the Bar of the Supreme Court of the United States, Counsel, at the offices of Edward Pious, 261 Broadway, New York, N. Y. 10007.

Supreme Court of the United States

No. 1160, October Term, 1968

HARRY LAIKIND,

Appellant,

—vs.—

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

SUPPLEMENTAL BRIEF

On April 7, 1969 the case of *Bjarsch and Kleiner* v. *The Surrogates of New York County*, 68 Civil 4216, No. 35742, which came to the attention of appellant on April 22, 1969, was decided by the U.S. District Court, S.D. of N.Y., (Herlands, *J.*). The Attorney General appeared upon behalf of the Surrogates.

The complaint there alleges SCPA 2218 in its entirety, and, specifically its section 1 (a) and (b), are unconstitutional.

According to the opinion, the motion "for the convening of a three judge court . . ." was "granted because a substantial question has been raised . . ." A hearing before the three judge court is scheduled for May 2, 1969.

Dated: April 24, 1969.

Respectfully submitted,

VICTOR KONOW,
A member of the Bar of the Supreme Court of the United States, Counsel, at the offices of Edward Pious, 261 Broadway, New York, N. Y. 10007.

NOV 6 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

No. 68, October Term, 1969

HARRY LAIKIND,

Appellant,

—vs.—

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellee.

MOTION FOR LEAVE TO SUPPLEMENT APPELLANT'S BRIEF AS SUPPLEMENTED

and

SUPPLEMENT TO SUPPLEMENTED BRIEF

VICTOR KONOW,
A Member of the Bar of the Supreme Court of the United States, Counsel at the offices of Edward Pious,
261 Broadway,
New York, N. Y. 10007.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Appellant respectfully moves this Court pursuant to Rule 16, subdiv. 5 of its Rules, for permission to supplement his brief as supplemented on April 24, 1969, with other intervening matter not then available.

Dated: November 5, 1969.

Victor Kokow,
A Member of the Bar of the Supreme Court of the United States, Counsel at the offices of Edward Pious.
261 Broadway,
New York, N. Y. 10007.

To: Attorney General of the State of New York

POINT A

THE JUDGMENT, BY STATUTORY LIMITATION, MAY NOT BE VACATED FOR THE PURPOSE OF INQUIRY INTO THE MERITS OF THE ACTION AFTER 5 YEARS FROM ITS ENTRY.

In our State, by statute,[1] referred to and construed in *Dobkin* v. *Chapman*, 21 N.Y. 2d 490, a judgment by default, predicated on service other than personal, may not be vacated unless a motion is made for such relief within 5 years after its entry.

In *United States* v. *Linzer Cleaning*, 173 Fed. Supp. 2d 227, 230 (U.S.D.C.-S.D.N.Y.), the requisites for judgment validity are set forth as follows:

> "The Board here is not a 'judgment creditor' in the usual, conventional sense, since it commenced no action, filed no complaint, served no summons, allowed no opportunity to answer and prepared no judgment".

The judgment here, entered May 18, 1964, is the result of positive compliance with the negative in the *Linzer* rule, *supra*.

To date, neither the Attorney General, nor any one else has moved to vacate, upon the premise that the underlying debt was not genuine, nor for any other cause.

---

[1] CPLR (Civil Practice Laws and Rules) Sec. 317: "A person served with a summons other than personal delivery to him * * *, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry * * *".

POINT B

TREATY INTERPRETATION IS ESSENTIAL FOR NATIONAL HEGEMONY BECAUSE STATES AND NATIONS WILL TAKE COHESIVE DIRECTION ONLY FROM THE SUPREME COURT OF THE UNITED STATES.

We are spanning treaty gaps not by revision of the old, but rather, by new conventions drawn to conform to new concepts of international understanding.[2] New interpretations by this Court, therefore, have become necessary.

The *Vienna Convention on Consular Relations*, which came into force on March 19, 1967 (596 UNTS 261) and the *Draft European Convention on Consular Functions and Optional Protocol*,[3] have similarities of substance and contexts with this Convention.

As the products of contemporary continuity of conciliation in accelerated international change, they exemplify today's direction towards discontinuity of resistance to change.

Where Supremacy is involved, it is difficult, if not impossible, to overcome Mr. *Justice Harlan's* maxim, in *Zschernig* v. *Miller*, advocating resort to the "adequate alternative" principle of non-constitutional adjudication.

---

[2] *Department of State Press Release* 252, September 2, 1969, says in part: "Secretary Rogers and the Belgian Ambassador, * * *, signed a new consular convention * * * on September 2.

The convention will replace the consular convention of March 9, 1880, * * *. In general, the new convention follows the pattern of more recent consular convention concluded by the United States with other countries dealing with the functions, privileges, and immunities of consular establishments. Its provisions reflect to some extent provisions in the multilateral consular convention signed at Vienna on April 24, 1963, now under consideration in the Senate Committee * * *."

[3] Council of Europe, Committee of Europe, Committee of Ministers, CM (64) 215, Addendum No. 1. (Strasbourg 5, November 1964).

Acceptance of his precept of priority, makes the treaty, not constitutional adjudication, the traditional activating catalyst which properly homogenizes Supremacy with the Common Law in derivation of a settled rule that began in this Court with *Hopkirk v. Bell*, 3 Cr. 454 (1806).

It is respectfully suggested that construction of the treaty in a contractual environment is the only constant that affords equal protection of "just due" within the objectives of the contracting parties.

Inconstants, such as adjudications by constitutional conformation to opinions, which themselves, are difficult to sustain in change, are not reconcilible to the inconstants of change without resort to abstract and euphemistic innovations.

The treaty, by its essence of existence in force, implies the presence of benefit, use and control.

Dated: November ~~15~~ 5, 1969.

Respectfully submitted,

VICTOR KONOW,
A Member of the Bar of the Supreme Court of the United States, Counsel at the offices of Edward Pious:
261 Broadway,
New York, N. Y. 10007.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

LAIKIND *v.* ATTORNEY GENERAL OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 68. Decided March 2, 1970.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a final judgment.

MR. JUSTICE DOUGLAS is of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits.